Mohamed Sari Datuk Haji Nuar & Anor v United Engineers (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-296 OF 1996

MOHD SAARI, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA

30 MAY 2003

Civil Procedure *— Pleadings — Striking out claim — Amended statement of claim — Whether claim disclosed a reasonable cause of action — Whether claim scandalous, frivolous or vexatious, was not otherwise an abuse of the process of the court — Rules of the High Court 1980 O 18 r 19(1)*

Under a contract of sale, the plaintiffs sold heavy machineries to the first defendant. At that time, the second and the third defendants were the directors of both the first and the fourth defendants. The first defendant required financing for the purpose of the purchase. The plaintiffs assisted in arranging for it. The first defendant secured a loan from Armco Pacific Ltd ('the Armco'). The first defendant failed to pay punctually the interests due and the repayments of the loan to the Armco. The Armco used the interests or some of the interests due to the first defendant on the cash collateral deposit to settle some of the first defendant's outstanding interests and part repayment of the loan. The loan was fully settled by the first defendant. The plaintiffs filed writ of summons claiming against the first defendant for the loss of the cash collateral deposit and part of the interests accrued thereon and in the alternative, for the same amount as money had and received to the use of the plaintiffs. With leave of the court, the plaintiffs also filed its amended statement of claim for breaches of the terms of the credit extension agreement and alleging fraud against the second, third and the fourth defendants in place of the breach of the indemnity. The defendants applied to strike out the plaintiffs' action. The learned deputy registrar dismissed the application to strike out the plaintiffs' action pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the appeal:

The law is settled that it is only in plain and obvious cases that recourse should be had to the summary procedure to strike out pleadings under O 18 r 19(1) of the RHC 1980. Having regard to the pleadings and the conflicting affidavit evidence, the court was satisfied that this case demonstrated triable issues centred on the alleged breaches of the terms of the credit extension agreement and on the allegation of fraud. Therefore, the amended statement of claim disclosed a reasonable cause of action, was not scandalous, frivolous or vexatious, was not otherwise an abuse of the process of the court and that the second, third and the fourth defendants were the proper and necessary parties in the action (see p 151A, F–G).

[Bahasa Malaysia summary

Di bawah satu kontrak belian, plaintif-plaintif telah menjual mesin-mesin berat kepada defendan pertama. Pada masa itu, defendan-defendan kedua dan ketiga adalah pengarah-pengarah kedua-dua defendan-defendan pertama dan keempat. Defendan pertama memerlukan pembiayaan kewangan bagi tujuan membuat belian. Plaintif-plaintif telah membantu untuk menguruskannya. Defendan pertama telah memperoleh satu pinjaman daripada Armco Pacific Ltd ('Armco'). Defendan pertama telah gagal untuk membayar tepat pada masanya faedah-faedah yang perlu dibayar dan pembayaran-pembayaran balik pinjaman tersebut kepada Armco. Armco telah menggunakan faedah-faedah atau sebahagian daripada faedah-faedah yang perlu dibayar kepada defendan pertama dalam deposit tunai kolateral untuk menyelesaikan sebahagian daripada faedah-faedah tertunga dan sebahagian daripada pembayaran balik pinjaman defendan pertama tersebut. Pinjaman tersebut telah diselesaikan sepenuhnya oleh defendan pertama. Plaintif-plaintif telah memfailkan writ saman menuntut terhadap defendan pertama kerana kehilangan deposit tunai kolateral tersebut dan sebahagian daripada faedah-faedah yang terakru dan secara alternatif, untuk jumlah yang sama kerana wang telah dan diterima untuk digunakan untuk plaintif-plaintif. Dengan kebenaran mahkamah, plaintif-plaintif juga telah memfailkan pindaan pernyataan tuntutan kerana perlanggaran-perlanggaran terma-terma perjanjian pembiayaan kredit dan menyetakan fraud terhadap defendan-defendan kedua, ketiga dan keempat kerana perlanggaran indemniti. Defendan-defendan telah memohon untuk membatalkan tindakan plaintif-plaintif. Timbalan pendaftar yang bijaksana telah menolak permohonan untuk membatalkan tindakan plaintif-plaintif menurut A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak rayuan tersebut:

Undang-undang adalah tetap bahawa hanya dalam kes-kes yang biasa dan jelas satu-satunya jalan untuk mengambil tindakan undang-undang melalui prosedur terus untuk membatalkan pliding-pliding di bawah A 18 k 19(1) KMT. Setelah meneliti pliding-pliding dan afidavit keterangan yang bercanggah, mahkamah berpuas hati bahawa kes ini menunjukkan terdapat persoalan-persoalan yang perlu dibicarakan berdasarkan pengataan-pengataan perlanggaran-perlanggaran terma-terma perjanjian pembiayaan kredit dan atas pengataan fraud. Oleh itu, pindaan pernyataan tuntutan menunjukkan satu kausa tindakan yang munasabah, tidak melampau, remeh atau menyusahkan, tidak sebaliknya satu penyalahgunaan proses mahkamah dan bahawa defendan-defendan kedua, ketiga dan keempat adalah pihak-pihak yang betul dan perlu dalam tindakan tersebut (lihat ms 151A, F–G).]

A **Notes**

For cases on striking out claims, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4739–4743.

B **Cases referred to**

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)

C **Legislation referred to**

Rules of the High Court 1980 O 14 r 1, O 18 r 19(1)

Appeal from: Civil Suit No K202 of 1989 (High Court, Kota Kinabalu)

D *Marina Tiu* (*Yap, Chin & Tiu*) for the plaintiffs.
Peter KC Lee (*Lee & Associates*) for the second and fourth appellants.
Colin Lau (*Colin Lau & Co*) for the third appellant.

E **Mohd Noor Ahmad JCA** (delivering judgment of the court): In Civil Appeal No S–02–296 of 1996, the second defendant appealed against the decision of the learned judge who dismissed his appeal to judge in chambers against the decision of the learned deputy registrar who dismissed his application to strike out the plaintiffs' action pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), and the fourth defendant appealed against the decision of the learned judge who allowed the F plaintiffs' appeal to judge in chambers against the decision of the learned deputy registrar who allowed the fourth defendant's application to strike out the plaintiffs' action under to O 18 r 19(1) of the RHC. In Civil Appeal No S–02–297 of 1996, the third defendant appealed against the decision of the learned judge who allowed the plaintiffs' appeal to judge in chambers against the decision of the learned deputy registrar who allowed the third G defendants' application to strike out the plaintiffs' action in accordance with O 18 r 19(1) of the RHC. In respect of the former, we dismissed their appeals and with regard to the latter, we also dismissed his appeal.

In a summary, the facts giving rise to the claim by the plaintiffs against the defendants are:

H (1) Under a contract of sale dated 28 October 1980 ('the CS'), the plaintiffs sold some heavy machineries to the first defendant for a sum of RM8,092,000. At that time, the second and the third defendants were the directors of both the first and the fourth defendants.

(2) The first defendant required financing for the purpose of the I purchase. The plaintiffs assisted to arrange for it. In December 1980, the first defendant secured a loan of US$3,820,000 from Armco Pacific Ltd ('the Armco'), a company operating in Singapore. In

relation to the said financing, the following agreements were, inter alia, entered into: A

(i) a debenture ('the debenture') made between the Armco and the first defendant dated 26 March 1981 whereby the Armco agreed to lend to the first defendant a loan of US$3,820,000 (the loan);

(ii) pursuant to the debenture, a recourse agreement was made between the Armco and the plaintiffs dated 1 June 1981 ('the RA') whereby the plaintiffs agreed to reimburse the Armco for any loss sustained by it in respect of the loan to the first defendant up to 20% of the outstanding balance from the date of the drawdown (July 1981 or thereabout) to the expiration of 24 months thereafter (July 1983 or thereabout); B C

(iii) a credit extension agreement made between the plaintiffs and the first defendant dated 6 June 1981 ('the CEA') whereby the plaintiffs agreed to extend credit to the first defendant to pay a sum of US$382,000 from the balance of the purchase price under the CS, so that the same amount from the loan could then be used as cash collateral deposit ('the CCD') to be deposited with the Armco by the first defendant, to secure the loan pursuant to the debenture. By cl 4 of the CEA, the balance sum of US$382,000 due from the first defendant to the plaintiffs under the CS would be paid to the plaintiffs from the CCD when the loan had been fully settled. This is the subject matter of the plaintiffs' claim against the defendants in the action. D E

(iv) Pursuant to the CEA, an indemnity was given by the second and the third defendants jointly and the fourth defendant separately, dated 6 June 1981 ('the indemnity') whereby they agreed to indemnify the plaintiffs for its loss, if any, arising out of or pursuant to the RA but not as a security for the CEA. F

(3) The first defendant failed to pay punctually the interests due and the repayments of the loan to the Amico. Hence, the Armco instead used the interests or some of the interests due to the first defendant on the CCD to settle some of the first defendant's outstanding interests and part repayment of the loan. In January 1984, the Armco duly informed the plaintiffs of the use. In fact, the said interests, as instructed earlier by the first defendant, ought to be paid over to the plaintiffs by the Armco towards settlement of the balance of the purchase price under the CS as stipulated in the CEA. The Armco gave the first defendant extension of time to repay the loan in full from 1 August 1985 to 1 January 1986 for which consent of the plaintiffs was sought by the first defendant. The loan was fully settled by the first defendant in December 1986. And on 6 April 1987, the Armco informed the plaintiffs that the CCD was utilized on 9 December 1986 for the purpose. G H

The plaintiffs filed the writ of summons on 12 September 1989 claiming against the first defendant for the loss of US$532,993.35 comprising of the CCD and part of the interests accrued thereon and in the alternative, for the I

same amount as money had and received to the use of the plaintiffs. For this claim, the plaintiffs had already obtained a summary judgment against the first defendant by reason of our decision in another appeal before us (Civil Appeal No S–02–294–1996) wherein we allowed the plaintiffs' appeal against the decision of the learned judge who allowed the first defendant's appeal to judge in chambers against the decision of the learned deputy registrar who allowed the plaintiffs' application for summary judgment under O 14 r 1 of the RHC, which is not the subject matter of this judgment. The plaintiffs also claimed against the second, third and the fourth defendants for the loss of the same sum for breach of the respective indemnity given by them. On 10 October 1989, the defendants by summons in chambers applied to strike out the plaintiffs' action. On 19 December 1990, with leave of the court, the plaintiffs filed its amended statement of claim ('the ASC') for breaches of the terms of the CEA and alleging fraud against the second, third and the fourth defendants in place of the breach of the indemnity.

The learned deputy registrar, in his written judgment in respect of the second defendant found against him because, being the director of the first defendant, he would have a major role in running the affairs of the first defendant. We agree with the learned deputy registrar's findings. However, we do not agree with him when he held that the plaintiffs' claim against the second defendant was not for breach of repayment of the CEA owing from the first defendant to the plaintiffs but in fact was a claim for defrauding the plaintiffs, which we will explain later. In the case of the third defendant, the learned deputy registrar decided in his favour on the ground that upon his resignation as the director in the first and the fourth defendants on 30 September 1983, his responsibility in the matter as alleged had ceased. We do not agree, in the light of our findings hereafter. With regard to the fourth defendant, the learned deputy registrar also decided in its favour by reason that the plaintiffs failed to show that it ever took part or representing itself in any of the negotiations or correspondence by any of its representatives in the alleged negotiations or correspondence, the subject-matter of the alleged fraud and that the fourth defendant would have benefitted from the said negotiations or correspondence was not sufficient to give rise to a cause of action for fraud against it. We do not agree, in view of our findings hereafter.

However, we are unable to decipher much from the written judgment of the learned judge being scanty except to note that the triable issues as found by him are related to the plaintiffs' allegation of fraud and the denial of the allegation of fraud by the third defendant.

The pertinent averments of the plaintiffs are contained in paras 7, 8, 9, 10, 11, 13, 14 and 15 of the ASC. It is clear that the plaintiffs' case is not only pitched on the allegation of fraud but also on the alleged breaches of the terms of the CEA. The plaintiffs averred that the second and the third defendants represented and covenanted on behalf of themselves and of the first and the fourth defendants that the CCD and the accrued interest thereon would be paid to the plaintiffs upon the expiry or earlier determination of the debenture, and in reliance of the said representation

and covenant the plaintiffs agreed and did extent credit to the first defendant in the sum of US$382,000 to be deposited with the Armco as the CCD out of the loan. The breaches lie in the allegation that the first defendant delayed payment of the instalment repayment as a result of which the interest due as from 11 October 1983 was utilized by the Armco to meet the defaulted repayments and the first defendant continued delaying the instalment repayment until on or around 9 December 1986 when the first defendant in further breach of the CEA utilized or caused to be utilized the CCD and the interests thereon to settle the Loan in full with the Armco. In our view, as the second defendant was a director in the first defendant, a company, who would have a major role in the running of the affairs of the first defendant and therefore, its alter ego, it seems that he would be implicated in the alleged breaches. Obviously, the fourth defendant, being a company, would also be implicated in the alleged breaches because the second defendant was also its director. With regard to the third defendant apparently he, being a director of both the first and the fourth defendants, was to a certain extent involved in the making of the said representation and covenants and in the alleged breaches. No doubt that he had resigned as director both in the first and the fourth defendants on 30 September 1983 however, apparently he has still to answer for the breaches in the repayment instalments during the period immediately preceding the resignation which prompted the Armco to utilize the interest on the CCD due on 11 October 1983 to partially offset overdue outstanding payments owing by the first defendant and which also triggered the Armco to consider granting the first defendant the extension of the term of the Loan for a further period of 12 months upon the first defendant paying up some of the arrears, the amount of which outstanding at the material time can only be determined at the trial. These facts can be gathered from the letters dated 11 January 1984 and 24 January 1984 sent by the Armco to the plaintiffs. Therefore, although the third defendant asserted that when he was director in both the first and the fourth defendants he was never actively participating in their management and since his resignation he was not involved at all with or had any knowledge of any transaction or business of the first and the fourth defendants, to our mind, these assertions can only be determined at the trial, in view of his involvement in the execution of the CEA as evident from the Minutes of the Resolution of the Board of Directors of the first defendant dated 5 June 1981.

A B C D E F G

On the allegation of fraud, we are of the view that from the particulars supplied by the plaintiffs' solicitors to the third defendant's solicitors as deposed by the third defendant in his second affidavit affirmed on 14 February 1995 (see para 4(iv)), the plaintiffs had sufficiently condescended to particulars of the alleged fraud as far as the allegations against the second and the fourth defendants are concerned. The particulars supplied are that the second and the third defendants on behalf of themselves and the fourth defendant, individually or in concert met directly with the Armco's representatives Ms Susan Sia/Ms Lee Siok Hooi on various dates at diverse places during the period 8 April to 9 December 1986. Anyway, further detailed particulars can be sought for and supplied

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A by between both parties during the pre-trial process, the truth or otherwise of the allegation can be determined at the trial.

The law is settled that it is only in plain and obvious cases that recourse should be had to the summary procedure to strike out pleadings under O 18 r 19(1) of the RHC. There are numerous authorities to support this B proposition of law. Suffice for me to cite what was said by Mohamed Dzaiddin SCJ (as his Lordship then was) in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under C this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*) (1899) 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1982] 3 Ch 274. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a D defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33, r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuch & Sons Ltd v Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or E that the claims are frivolous or vexatious or that the defences raised are not arguable.

In proceedings to strike out pleadings, it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, especially when issues of credibility are involved. The appropriate time for assessing the evidence, F having regard to the particular circumstances of the case is at the trial when there will be a full opportunity for cross-examination and discovery (see *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 per Edgar Josesph Jr SCJ).

To conclude, having regard to the pleadings and the conflicting G affidavit evidence, we are satisfied that the case demonstrates triable issues centred on the alleged breaches of the terms of the CEA and on the allegation of fraud. Therefore, we rule that the ASC discloses a reasonable cause of action, is not scandalous, frivolous or vexatious, is not otherwise an abuse of the process of the court and that the second, third and the fourth defendants are the proper and necessary parties in the action.

H My learned brothers Mohd Saari and Arifin Zakaria JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

I Reported by Peter Ling